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No. 84-10

In The

Supreme Court of the United States

October Term, 1984

CITIES OF BETHANY, BUSHNELL, ILLINOIS, ET AL.,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF CENTRAL ILLINOIS PUBLIC SERVICE COMPANY IN OPPOSITION TO PETITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

The only question raised in this case is the proper interpretation, under familiar principles of contract law and construction, of the service agreements entered into in 1965 by Central Illinois Public Service Company and the municipalities of Casey, Flora, Greenup and Newton, Illinois.

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COUNTERSTATEMENT OF THE CASE

I. PRELIMINARY STATEMENT

Petitioners Casey, Flora, Greenup, and Newton, Illinois (the "Cities") are wholesale customers of respondent, Central Illinois Public Service Company ("CIPS" or "Company").[1] In *Cities of Bethany, Bushnell, Illinois, et al. v. FERC*, 727 F.2d 1131 (D.C. Cir. 1984) (*reh'g denied*

[1] CIPS has no parent corporation. The Company has one subsidiary which is not wholly owned, Electric Energy, Inc.

and suggestion for reh'g en banc denied, April 6, 1984) (*Cities of Bethany*), the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") interpreted a contract provision included in each of the service agreements between CIPS and the Cities. The Cities ask this Court to review the D.C. Circuit's contract interpretation. There is no reason to do so.

Certiorari is not required in this case to vindicate this Court's *Mobile-Sierra*[2] doctrine; the D.C. Circuit's decision does not create the need for such vindication. This case involves a singular contract provision unique to one group of contracts between one utility and one set of customers. The D.C. Circuit carefully reviewed this provision and interpreted the CIPS-Cities contracts in such a way as to fairly effectuate the intent of the parties. During its review the D.C. Circuit had before it the cases which the Cities now claim raise a conflict among the circuits.[3] Those cases did not persuade the D.C. Circuit then, and no conflict exists now, because all of those cases involved different contracts, with different contract language, representing different contractual intent. What the decision below shares with all of the cases cited by the Cities is that once the contract at issue had been interpreted by the reviewing court, the contract was held to be determinative of the type

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[2] *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

[3] Not only did the parties' briefs bring these cases to the lower court's attention prior to the decision below, but the Cities also raised the identical claim of conflict among the circuits in their petition for rehearing at the D.C. Circuit. Petition for Rehearing And Suggestion For Rehearing En Banc of Cities of Bethany, *et al.*, 4-9. The lower court denied the Cities' petition. *Cities of Bethany, Bushnell, Illinois, et al. v. FERC*, 727 F.2d 1131 (D.C. Cir. 1984) (*reh'g denied* April 6, 1984). The Federal Energy Regulatory Commission ("FERC" or "Commission") did not seek rehearing at the D.C. Circuit.

of rate filing that the utility was permitted to make under the Federal Power Act. That holding is what *Mobile-Sierra* requires and, consistent with *Mobile-Sierra* and the cases cited by the Cities, that was the holding of the court below.

The Cities are simply unhappy with the Circuit Court's contract interpretation, and they request this Court to substitute a new interpretation for the one reached by a unanimous panel of the lower court. The question that the Cities are attempting to raise here is not whether the parties' contracts govern their supplier-customer relationship. No one disputes that this is the law under *Mobile-Sierra*; not CIPS, not the Cities, and not the Circuit Court. The question that the Cities seek to raise in this Court is the proper construction of their contracts with CIPS. That question has already been answered by the D.C. Circuit through application of basic principles of contract law, after exhaustive and time consuming analysis by both the parties and the lower court. Granting certiorari in this case would simply embroil this Court in a reanalysis of those agreements under familiar rules of contract law and contract interpretation. No other purpose would be served, certainly not the purposes of this Court. The Cities' petition for certiorari should be denied.

II. RELEVANT FACTS AND PROCEEDINGS

A. Introduction

This case involves the question of whether CIPS may make rate filings applicable to the Cities under § 205 of the Federal Power Act, 16 U.S.C. § 824d, or whether its contractual obligations with the Cities limit the Company to rate filings under § 206 of that Act, 16 U.S.C. § 824e. Under § 205, rate filings become effective after a suspension period of no longer than five months. Federal Power Act, 16 U.S.C. § 824d(e). Under § 206 rate filings can become effective only prospectively after the FERC has issued an order setting the just and reasonable level of

the new rate.[4] Federal Power Act, 16 U.S.C. § 824e(a). The practical effect of the difference between the two types of filings is that under § 205 new rates become effective during the sometimes lengthy period needed by the FERC to fully consider the justness and reasonableness of a rate filing; under § 206 the utility's old rate must remain in effect throughout this entire period. In this case that period lasted over two years and two months, from May 10, 1980, when CIPS' new rate became effective pursuant to § 205, until July 12, 1982, the date the Commission issued its Opinion No. 142, 20 F.E.R.C. ¶ 61,043 (1982).

B. Conduct Of The Parties

In 1965, CIPS and the Cities entered into the twenty year wholesale service contracts at issue. The contracts fixed the rate to be charged during the first ten year period, and specifically stated that the initial rate would apply only during those first ten years. Rates for the second ten years of the contracts were to be agreed upon by the parties:

> The term of this agreement shall be for a period of twenty years from and after the date on which service is first delivered to City hereunder;[5] *provided however, that the rate and charges for service hereinbefore set forth shall apply only during the first ten years of the period*, and the rates and charges for the second ten years of the period shall be mutually agreed to by both parties subject to the approval of the regulatory body or bodies as may have jurisdiction thereof. R. 2932, 2943 (emphasis added).

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[4] As to rate filings made under § 205, if the Commission determines that the just and reasonable rate level is lower than the rate level initially filed by the Company, appropriate refunds are ordered.

[5] The quoted language is found in paragraph 13 of both the Casey and Newton contracts. Paragraph 13 of the Flora and Greenup contracts each recite that the term of those agreements is for twenty years "from and after the effective date hereunder." *See* Opinion No. 142, 20 F.E.R.C. ¶ 61,043, at 61,090. This slight language difference has no significance with respect to the contract issue decided by the lower court.

For ten years, from 1965 to 1975, CIPS charged the Cities the rate set forth in the contracts, as the Company had agreed to do. In the spring of 1975 each of the Cities was contacted by CIPS and provided with a copy of a new rate, W-2, which CIPS proposed to file at the Federal Power Commission[6] to become effective at the termination of the initial ten year period. R. 2746-47. At the same time, *prior* to CIPS filing the new rate pursuant to § 205, the Cities were provided with a rate comparison showing the Company's billings under the rate in effect during the first ten years of the contracts as compared to billings which would have been made under the proposed new rate[7]. *Id.*

Four times over the course of the next six and a half years CIPS filed increases in the rate applicable to the Cities under § 205 of the Federal Power Act. On none of these occasions did the Cities object to the use of § 205 filings as the appropriate method for establishing their rates. The last of these four filings was in this case. As noted, the Cities did not raise their *Mobile-Sierra* claim at that time. The parties then engaged in extensive efforts to settle, but were unable to reach agreement on the rate to be charged the Cities. Thereafter lengthy hearings were held before the FERC. On August 6, 1980, the record, consisting of 996 transcript pages, 57 exhibits, and one item by reference, was closed. An Initial Decision by a FERC Administrative Law Judge was issued on March 2, 1981, almost a year and a half after the Company's filing. At that time the Cities still had not raised any *Mobile-Sierra*-based

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[6] The functions and responsibilities of the Federal Power Commission were transferred to the FERC in 1977. 42 U.S.C. § 7172(a) (Supp. V 1981).

[7] The Cities' petition for certiorari at pages 3 and 4 quotes a letter which CIPS sent to the Cities in 1975 after the Federal Power Commission had accepted the Company's new rate for filing. The Cities' petition implies that this letter represented the first time that the Company contacted the Cities on this matter. As indicated above, this is not the case.

objection to the filing. Briefing to the full Commission on exceptions to the Initial Decision was completed by June 5, 1981, *again* without any mention by the Cities of the *Mobile-Sierra* claim made here. It was not until seven months later, over two years after CIPS' filing in this case and six and a half years after the Company first filed its W-2 rate under § 205, that the Cities first raised their *Mobile-Sierra* claim in a pleading filed at the FERC.[8]

C. The Parties' Arguments And The De isions Below

Before the FERC, the Cities argued that their agreements with CIPS were fixed rate contracts for the full twenty year term of those contracts. They argued that the mutual agreement language in the contracts gave them the ability to veto any new rate proposed by CIPS during the second ten years of the contracts simply by withholding their agreement to the new rate. Opinion No. 142, 20 F.E.R.C. ¶ 61,043 at 61,090. In the alternative, the Cities argued that the phrase "subject to approval" required that no new rate could take effect as to them except prospectively after the FERC had issued an order setting the just and reasonable level of the new rate.

CIPS responded that the CIPS-Cities contracts could not be fragmented as the Cities proposed, but had to be interpreted in their entirety to properly determine the intent of the parties. When viewed in its entirety, the language of the contracts showed that the parties had intended that the Cities' rate was to be fixed for the first 10 years of the contracts, but that the rate fixed in the contracts was to apply "*only* during the first ten years of the period. . . ." (emphasis added). The contracts assumed that the parties would be able to agree on new rates during the course of the second ten year period and accordingly included an "agreement to agree" on rates beginning in 1975.

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[8] None of the events recited in this section was disputed before the FERC or the D.C. Circuit.

That assumption was wrong. The parties were unable to agree on appropriate rate levels and effective dates for those new rate levels during the second ten years of their contracts. Thus, the FERC and the D.C. Circuit were required to fairly effectuate the intent of the parties under the circumstances where the parties' "agreement to agree" had failed. CIPS argued that under basic principles of contract law, a failed "agreement to agree" was either unenforceable or, if the parties were viewed as having intended to conclude an enforceable agreement, the failed provision was an "open price term" for which the "reasonable price at the time of delivery" could be substituted. *See* U.C.C. § 2-305(1)(b). In either case, CIPS argued, its present contractual obligations were consistent with rate filings under § 205 because either the contractual provision was a nullity or, if the reasonable price at the time of delivery was to be implemented, only a § 205 type filing could accomplish that result.

The FERC agreed with much of CIPS' contract interpretation. The FERC stated:

> Applying section 2-305 to these contracts, we reach the following conclusions: (1) the sale of electrical energy is directly analogous to the sale of natural gas and is therefore within the purview of § 2-105 of the U.C.C., (See §2-105:5), (2) the parties intended to conclude contracts for the sale of electrical energy even though the prices for the second 10 year period of the contracts were not settled, (3) the prices were left to be agreed by the parties subject to Commission approval and they have failed to agree, (4) in such circumstances the price is a reasonable price at the time for delivery, (5) the reasonable price is represented by the just and reasonable W-2 rate established by this order based on CIPSCO's fully allocated costs. Opinion No. 142, 20 F.E.R.C. ¶61,043 at 61,092.

Despite having agreed with CIPS as to the meaning of all of the provisions actually contained in the CIPS-Cities contracts, because the FERC could not find a provision in these agreements which expressly authorized a § 205 filing, it held that such a filing was not permitted. Opinion No. 142, 20 F.E.R.C. ¶ 61,043 at 61,092. The FERC placed the just and reasonable W-2 rate established by its Opinion No. 142 in effect as of May 10, 1980 for all of the W-2 municipalities other than the Cities. For the Cities that rate was not permitted to take effect until July 12, 1982, the date on which the FERC issued Opinion No. 142. The effect of the Commission's holding was that for more than two years, from May 10, 1980 until July 12, 1982, the Cities were not required to pay the reasonable rate at the time of the delivery of CIPS' services. CIPS appealed the Commission's decision on this issue, as did the Cities.

On appeal, the D.C. Circuit also agreed with CIPS interpretation of the contract provision at issue. *Cities of Bethany*, 727 F.2d 1143-44. Although it did not rely specifically on the U.C.C, as had the FERC, the D.C. Circuit found that the parties' "agreement to agree" was indeed an "open price term." *Cities of Bethany*, 727 F.2d at 1143. Moreover, based primarily on its prior decision in *City of Piqua, Ohio v. FERC*, 610 F.2d 950 (D.C. Cir. 1979), the lower Court rejected the Cities' argument founded on a selective emphasis of the phrase "subject to approval." The D.C. Circuit decided that in the context of the rest of the language included in the CIPS-Cities contracts that phrase

did not limit CIPS to filings under § 206.[9] When viewed in its entirety the D.C. Circuit found that "[t]he language of the contract provisions at issue here is consistent with permitting section 205 filings when the parties fail mutually to agree on rates." *Cities of Bethany*, 727 F.2d at 1143-44. Finally, having carefully reviewed all of the operative language of the CIPS-Cities' contracts, the Court specifically rejected the notion that these contracts required an express provision granting CIPS the right to make filings under § 205. *Cities of Bethany*, 727 F.2d at 1144.

SUMMARY OF ARGUMENT

The D.C. Circuit's decision does not depart from settled *Mobile-Sierra* precepts and does not create a conflict within the D.C. Circuit or with any other circuit. The D.C. Circuit faithfully adhered to the *Mobile-Sierra* doctrine. The cases cited by the Cities do not constitute grounds for review of this case because the circuit courts in the cases

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[9] In making its argument to the D.C. Circuit, CIPS had relied heavily on the lower Court's decision in *City of Piqua*. As emphasized by CIPS, what the CIPS-Cities contracts provided that the FERC would "approve," were the various rates agreed to by the parties over the course of the second ten years of the contracts. *City of Piqua* forcefully demonstrates that when parties agree on rates and on the effective date for those rates, a § 205 filing may be the only way of effectuating the parties' agreement. It is only under § 205 that the FERC has the flexibility to place rates into effect on any date agreed upon, even a date prior to the actual filing of the agreed-upon rate, as was the case in *City of Piqua*. The FERC enjoys no such flexibility under § 206. It was simply unreasonable in the context of the CIPS-Cities contracts to conclude that the parties had intended to agree on rates and had also intended to limit the FERC's ability to effectuate their agreements, by forbidding § 205 filings. Section 205 filings were wholly consistent with, indeed required by, the parties' bargain. *City of Piqua* also demonstrates that when the FERC does place agreed-upon rates in effect, that Commission action has been labeled one of "approval".

cited merely applied the *Mobile-Sierra* doctrine in the same way that the D.C. Circuit applied that doctrine in this case, but to different contractual language. Only the Cities' violation of a fundamental rule of contractual interpretation, that a contract must be read as a whole in order to ascertain the intentions of the parties, permits the Cities to make the superficial argument that a conflict exists among the circuits. The *Mobile-Sierra* issue in this case was decided on the basis of the contract at issue in this case, and in accord with basic principles of contract law and contract interpretation. The decision of the court below presents no issues for review by the Supreme Court.

Furthermore, the D.C. Circuit did not make a *de novo* finding of fact concerning the parties' course of conduct but merely decided a question of law based on undisputed facts. If the lower court committed any error by commenting on the course of conduct by the parties, that error was harmless and presents no grounds for review by the Supreme Court.

REASONS FOR DENYING THE WRIT

I. THE D.C. CIRCUIT'S DECISION IN THIS CASE DOES NOT RESULT IN A CONFLICT AMONG THE CIRCUITS AND IS THEREFORE NOT APPROPRIATE FOR REVIEW BY THIS COURT.

The court below decided this case through faithful application of the *Mobile-Sierra* doctrine.

> The rule of *Sierra*, *Mobile* and *Memphis* is refreshingly simple: the contract between the parties governs the legality of the filing. Rate filings consistent with contractual obligations are valid; rate filings inconsistent with contractual obligations are invalid.

Richmond Power & Light v. FPC, 481 F.2d 490, 493, *cert. denied*, 414 U.S. 1068 (1973). In full accord with this Court's *Mobile-Sierra* doctrine, the D.C. Circuit correctly defined the issue before it as being "whether the parties

intended to permit CIPS to use the section 205 method of rate-setting, with its immediate effective date, or the section 206 method of rate-setting by FERC, which takes effect only after FERC issues its order setting a just and reasonable rate." *Cities of Bethany*, 727 F.2d at 1143. Then, by carefully considering the contractual language at issue, the intentions of the contracting parties, and the judicial precedent on point, the D.C. Circuit correctly decided that the CIPS-Cities contracts are consistent with filings under § 205:

> The language of the contract provisions at issue here is consistent with permitting section 205 filings when the parties fail mutually to agree on rates. Open rate terms in contracts may properly be interpreted to permit a utility unilaterally to file rates under section 205.[58] Furthermore, the language in the contract providing that rates shall be agreed upon by the parties "subject to the approval of the regulatory body" is also consistent with section 205 filings. FERC's authority under section 205 to suspend and investigate rates filed under section 205 has been interpreted as the authority to "approve" rates.[59]
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> 58. *See, e.g., Borough of Lansdale, Pa. v. FPC*, 494 F.2d 1104, 1106 n.2 (D.C. Cir. 1974).
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> 59. *See City of Piqua, Ohio v. FERC*, 610 F.2d 950 (D.C. Cir. 1979).

Cities of Bethany, 727 F.2d at 1143-44.

The opinion of the court below is not in conflict with any decision within the D.C. Circuit or with any other circuit. The D.C. Circuit correctly applied the well settled *Mobile-Sierra* doctrine to the CIPS-Cities contracts.

The Cities' entire argument before this Court is based on a violation of the fundamental rule of contract interpretation, that the contract must be read as a whole in order to ascertain its meaning. The Cities erroneously suggest that in every context the phrase "approval of the regulatory

body" requires rate filings under § 206 of the Federal Power Act. Repeatedly, the Cities isolate the phrase "subject to approval" and insist that the presence of this phrase alone determines the *Mobile-Sierra* issue. Every major treatise on contracts recognizes that a contract must be read in its entirety and that the intentions and purposes of parties to a contract cannot be ascertained from detached or isolated portions of the contract. *See, e.g.*, 4 S. Williston, *A Treatise on the Law of Contracts* § 618 at 710-16 (3d ed. 1961 & Supp. 1984).

Moreover, the FERC itself, in determining the very issue of whether the mere mention of the word "approval," "prescribed," "ordered," or "authorized" in a contract necessarily leads to a § 205 or § 206 procedure, ruled that such piecemeal analysis is without merit. *Appalachian Power Co.*, 57 F.P.C. 1140, 1141 n.2 (1977) (order denying rehearing). In ruling that the mere mention of a word such as "approval" or "authorized" cannot be dispositive of a *Mobile-Sierra* issue, the FERC announced:

> It is not the use of a particular word on which *Mobile-Sierra* determinations turn but on the way words are used to express the intentions of the parties to a contract . . . . The Commission's decision must be based on more than semantics. *Id.*

General principles of contract interpretation reject the type of tunnel-vision analysis that the Cities urge upon this Court. Not surprisingly, this type of analysis was rejected by the FERC and the D.C. Circuit as well. The Cities' argument can provide no basis for a grant of certiorari.

Good reason for giving no credence to the Cities' argument, based solely on whether a single term such as "approval" can be found in the contract at issue, is provided by the cases relied upon by the Cities themselves. Although a term such as "order", "approval" or "authorize" can be found in the cases cited by the Cities, a brief review

of all of the operative contract language found in those cases readily displays the fundamental differences between those contracts and the CIPS-Cities contracts. None of the cases cited by the Cities[10] involves a contract which provides, as an integral part of the parties' original contractual bargain, that the rate fixed in the agreement would terminate after an initial period of time. This is exactly what is provided for in the CIPS-Cities contracts. In each of the cases cited by the Cities the contract at issue anticipated that the rate in effect under the contract would continue in effect for the full term of the agreement unless that rate was superseded or changed by a new rate "ordered" or "approved" by the Commission. That was the parties' bargain under those contracts.

In a case which involves a continuing contract rate in which the parties have agreed that any changes are to be "approved" by the appropriate regulatory body, it may be reasonable to interpret that contract as requiring that any changes to the bargained for rate must take effect only prospectively after final Commission action under § 206. In this case, however, part of the parties' original bargain was that the initial contract rate would expire in 1975. Here, there is no continuing contract rate. In this case CIPS is not seeking to "change" an agreed-upon rate by making a § 205 filing. The Company is merely seeking a way to implement the reasonable rate for its services to the Cities during the course of the second ten years of their contracts, in a situ-

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[10] *Kansas Cities v. FERC*, 723 F.2d 82 (D.C. Cir. 1983); *New York State Electric & Gas Corp. v. FERC*, 712 F.2d 762 (2d Cir. 1983); *Public Service Co. of New Mexico v. FERC*, 628 F.2d 1267 (10th Cir. 1980), *cert. denied*, 451 U.S. 907 (1981); *City of Oglesby v. FERC*, 610 F.2d 897 (D.C. Cir. 1979); *Papago Tribal Utility Authority v. FERC*, 610 F.2d 914 (D.C. Cir. 1979); *Louisiana Power & Light Co. v. FERC*, 587 F.2d 671 (5th Cir. 1979); *Public Service Company of New Mexico v. FPC*, 557 F.2d 227 (10th Cir. 1977).

ation where the parties' agreement to agree has failed. Only a § 205 filing accomplishes this result, a result fully consistent with the parties' bargain.

From the first, the Cities have attempted to obscure the distinction between this case and cases in which "changes" in continuing contract rates are sought, a practice they continue before this Court.[11] From the first, the Cities' attempt to gloss over this distinction has been rejected. See Opinion No. 142, 20 F.E.R.C. ¶ 61,043 at 61,092. It should be rejected here as well. This case is not a "rate change" case. No conflict among the circuits or within the D.C. Circuit exists and the Cities' petition for certiorari should be denied.

II. THE CIRCUIT COURT'S DECISION IS NOT BASED ON A *DE NOVO* FINDING OF FACT.

The Cities' second basis for seeking review in this Court is its claim that the D.C. Circuit impermissibly based its holding below on a *de novo* finding of fact. This claim is founded on the lower court's conclusion that the parties' conduct since 1975 was "highly instructive as to the fair meaning of the Casey Group contracts." *Cities of Bethany*, 727 F.2d at 1144. No error was committed by the lower court. If any error was committed, it was harmless.

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[11] The first "Question Presented" by the Cities asks whether the *Mobile-Sierra* doctrine protects contracts which require "that any *change* in rate be 'subject to the approval of the regulatory body' . . . ." (Emphasis added). Whatever the answer, this question was not asked in this case.

A. The Circuit Court Did Not Make Any *De Novo* Findings Of Fact When It Decided A Question Of Law Based On Undisputed Facts.

The court below did not make any *de novo* findings of fact when it examined the parties' course of conduct. The court below acted entirely within its power of review when it determined the legal effect of the undisputed facts before it.

A court may examine extrinsic facts, such as course of conduct, when construing a written contract. *Restatement (Second) of Contracts* §202(4) (1979). If these facts are undisputed, a court of appeals can properly decide their legal effect, "the question is one of law, not fact." *Associated Tabulating Services, Inc. v. Olympic Life Insurance Co.*, 414 F.2d 1306, 1310 (5th Cir. 1969). In other words, the "principles of contract interpretation to be applied to . . . facts . . . are legal issues which [the] court can review" on appeal. *United States v. Haas & Haynie Corp.*, 577 F.2d 568, 572 (9th Cir. 1978).

The court below properly considered the legal effect of the undisputed course of conduct between the parties. Neither party has ever disputed the fact that for more than six and a half years, the Cities did not question CIPS' right to institute § 205 rate filings under the provisions of the contracts. Because this course of conduct is undisputed, the court below acted within its authority when it determined that the conduct is "probative of the parties' intent and of

the fair meaning of the contracts." *Cities of Bethany*, 727 F.2d at 1144. The D.C. Circuit did not make *de novo* findings of fact. Instead, the court properly decided a question of law based on undisputed facts.[12]

B. The Circuit Court's Analysis Of The Contract Language Itself Constitutes An Independent And Sufficient Basis For The Circuit Court's *Mobile-Sierra* Decision.

In this case, the lower court ruled unequivocally that the language of the CIPS-Cities contracts is consistent with § 205 filings:

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[12] The Cities' entire argument on this point is based on the erroneous assertion that the D.C. Circuit's decision is inconsistent with findings of fact made by the FERC. This is not so. Before the FERC, CIPS made several alternative arguments in support of its § 205 filing. The main thrust of CIPS' position was that § 205 filings were fully consistent with the terms of its contracts with the Cities. However, if the FERC disagreed with the Company, CIPS alternatively argued that the conduct of the parties since 1975 had resulted in a modification of those contracts. The FERC rejected CIPS' modification argument, Opinion No. 142, 20 F.E.R.C. ¶ 61,043 at 61,090-61,091, but there is nothing inconsistent between that action by FERC and the D.C. Circuit's opinion. Modification requires a showing of consideration. *Nyhus v. Travel Management Corp.*, 466 F.2d 440, 445-46 & n.24 (D.C. Cir. 1972); *Utah Power & Light Co.*, Initial Decision, 11 F.E.R.C. ¶ 63,017 at 65,076 (1980), *aff'd [modified on other grounds]*, 14 F.E.R.C. ¶ 61,162 (1981). Consequently, although the parties undisputed course of conduct may have been insufficient to prove that the parties had modified their original bargain, that course of conduct can still be "instructive" as to what the parties original bargain was. By emphasizing only one of the arguments made by CIPS to the FERC, the Cities have attempted to manufacture an inconsistency where none exists.

> The language of the contract provisions at issue here is consistent with permitting section 205 filings when the parties fail mutually to agree on rates. . . . Furthermore, the language in the contract providing that rates shall be agreed upon by the parties "subject to the approval of the regulatory body" is also consistent with section 205 filings.

Cities of Bethany, 727 F.2d at 1143-44. This conclusion by the D.C. Circuit, reached prior to any consideration of the parties' conduct and based solely on the four corners of the contracts, provides an independent and fully sufficient basis of support for the lower court's ultimate holding. Thus, if the lower court committed any error in commenting on the course of conduct of the parties since 1975, that error was harmless.

C. Summary

Certiorari will only be granted on a question such as the second question presented by the Cities here, if it can be demonstrated that the D.C. Circuit "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Supreme Court Rule 17. No such demonstration has been made. It was entirely appropriate for the D.C. Circuit to use the parties' undisputed course of conduct over six and a half years to test the reasonableness of the conclusion that the lower court had already reached regarding their agreements, based solely on the language of those agreements.

The only basis for the Cities' argument that the D.C. Circuit's conduct was somehow inappropriate, is a 1975 letter which CIPS sent to the Cities reporting that the Federal Power Commission had accepted the Company's 1975 filing of its new W-2 rate. Without disclosing that CIPS had discussed this matter with the Cities before making its 1975 filing, and despite the fact that there is nothing

at all deceptive about CIPS' letter, Cities contend that this one letter in 1975 misled them for the next six and a half years, rate filing after rate filing, into never complaining about the Company's § 205 filings. During all this time the Cities were fully aware of, and had before them, the language of their contracts with CIPS. This argument is nothing more than an after-the-fact rationalization. This rationalization cannot tarnish even slightly the well-reasoned decision of the D.C. Circuit, and is not worthy of certiorari.

CONCLUSION

The D.C. Circuit faithfully followed this Court's *Mobile-Sierra* doctrine and no conflict among the circuits exists. For these reasons, the Cities' petition for a writ of certiorari should be denied.

Respectfully submitted,

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